Ismail bin Mohd Yunos & Anor v First Revenue Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2-22-137 OF 1994
KAMALANATHAN RATNAM J
11 AUGUST 1999

Contract *— Specific performance — Claim for balance of service fee — Whether specific performance ought to be granted in respect of claim for money — Whether plaintiff entitled to balance of service fee progressively over development of project — Specific Relief Act 1950 s 18(2)*

Contract *— Uncertainty — Incomplete and uncertain terms — Memorandum of understanding — Variation of term, whether amount to uncertainty — Whether defendant estopped to deny intention to create legal relations — Whether request by defendant amount to pre-condition to contract*

In consideration of the plaintiffs securing a joint venture arrangement with the Selangor State Government, the defendant agreed to pay the plaintiffs certain benefits which were contained in two memorandum of understanding ('MOU') dated 10 December 1991 and 27 January 1992 respectively. The plaintiffs commenced an action against the defendant for refusal to honour the agreement. The plaintiffs claimed for the following reliefs, based on the MOUs: (i) the sum of RM100,000 being the first progress payment already due to him as of 15 April 1993; (ii) specific performance to pay the balance of the service fee progressively over the development of the project; and (iii) specific performance to transfer to each of the plaintiffs a piece of water front land of the project or in lieu thereof damages of RM450,000. The defendant admitted to the MOUs but challenged their enforceability on grounds of uncertainty. It was submitted that the MOUs contained terms that were incomplete and uncertain and therefore unenforceable under s 20(1)(c) of the Specific Relief Act 1950.

Held:

(1) The fact that the parties intended the MOUs to have the 'force of law' if the joint venture project materialized was clearly and unambiguously expressed by their joint intention. The parties had also expressed their clear intention to bind their heirs and successors-in-title. Having considered the full import of the first MOU, the court did not find any uncertainty therein (see pp 49G, 50F).

(2) Having relied on s 20(1)(c) of the Specific Relief Act 1950, the defendant had not pointed out any material uncertain terms in the MOU. Instead, the defendant referred to a letter wherein the plaintiff agreed to accept 3% from the earlier 15% and pointed out that this was a variation. A variation of a term was not the same as an uncertain term. Moreover, the variation was clearly explained by the plaintiff. Having considered all facts, the court

found both the MOUs were binding on the parties and that the defence of uncertainty raised by the defendant must fail (see pp 51D–E, G–H).

(3) As the plaintiffs had fully performed their task and as it was the defendant who had failed to honour the promise, the defendant must be estopped from denying that there was indeed an intention to create legal relations between the parties through the MOUs (see p 52F).

(4) The defendant's attempt to have the final paragraph relating to the two conditions that the reclaimed land be alienated to the defendant and it should be liable to be charged were not pre-conditions for the fulfilment of the payments to the plaintiffs. If the defendant had intended the two conditions to be pre-conditions, they would have clearly expressed such intention. Reading the requirement of the two conditions as stated in the MOU, the court found that it was more of a request by the defendant than a stipulation as a pre-condition (see pp 52H–53A).

(5) Since there was documentary evidence that the land had been alienated on 15 April 1993, the plaintiff was entitled to the sum of RM100,000 with interest at 4% from 15 April 1993 to the date of judgment (see p 54B–C).

(6) In respect of the plaintiff's claim for specific performance to pay the balance of the service fee progressively upon the happening of the events stated in the second MOU, specific performance ought not to be ordered in respect of a claim for money. However, the plaintiff was entitled to the balance of the service fee progressively over the development of the project in pursuant to s 18(2) of the Specific Relief Act 1950 (see p 54C, G).

(7) The demand for specific performance to transfer to the plaintiffs each a piece of water front land of the project or in lieu thereof damages of RM450,000 each to both the plaintiffs was unsustainable. The land had not even been reclaimed. Even if it is reclaimed subsequently, the parties had not identified precisely the two blocks of land on the water front. The claim for specific performance must fail. The plaintiffs led no evidence as to how they were able to pick the figure RM450,000. Since the defendant had not agreed to any figure, it was clearly incumbent upon the plaintiffs to prove this claim. Merely suggesting a figure or leaving it to the court to make an award was fruitless. The court must be guided. In the absence of any guidance, this claim was rejected (see p 55B–D).

[Bahasa Malaysia summary

Sebagai balasan bagi plaintif-plaintif untuk memperoleh suatu urusan usahasama dengan Kerajaan Negeri Selangor, defendan telah bersetuju untuk membayar kepada plaintif-plaintif faedah-faedah

tertentu yang terkandung di dalam dua memorandum persefahaman ('MOU tersebut') masing-masing bertarikh 10 Disember 1991 dan 27 Januari 1992. Plaintif-plaintif telah memulakan suatu tindakan terhadap defendan kerana enggan menghormati perjanjian itu. Plaintif-plaintif telah menuntut relif-relif berikut, berdasarkan kepada MOU tersebut: (i) sejumlah RM100,000 sebagai bayaran peringkat pertama yang telahpun perlu dibayar kepadanya pada 15 April 1993; (ii) pelaksanaan spesifik untuk membayar baki yuran perkhidmatan secara berperingkat-peringkat terhadap pembangunan projek itu; dan (iii) pelaksanaan spesifik untuk memindahkan kepada setiap seorang plaintif itu sebidang tanah kawasan dermaga projek itu atau sebagai ganti, suatu ganti rugi sebanyak RM450,000. Defendan telah mengakui MOU tersebut tetapi telah mencabar penguatkuasaan MOU tersebut atas alasan ketidakpastian. Adalah dihujahkan bahawa MOU tersebut mengandungi terma-terma yang tidak lengkap dan tidak pasti dan oleh demikian tidak boleh dikuatkuasakan di bawah s 20(1)(c) Akta Relif Spesifik 1950.

Diputuskan:

(1) Hakikat bahawa pihak-pihak tersebut bermaksud untuk MOU tersebut mempunyai 'kuatkuasa undang-undang' sekiranya projek usahasama itu menjadi kenyataan telah dinyatakan dengan jelas dan taksa oleh maksud bersama mereka. Pihak-pihak itu juga telah menyatakan dengan jelas maksud mereka untuk mengikat waris-waris dan pengganti-pengganti mereka. Setelah mempertimbangkan keseluruhan maksud MOU pertama tersebut, mahkamah tidak menjumpai apa-apa ketidakpastian (lihat ms 49G, 50F).

(2) Dengan bergantung kepada s 20(1)(c) Akta Relif Spesifik 1950, defendan tidak menunjukkan apa-apa terma-terma yang tidak pasti yang material di dalam MOU tersebut. Sebaliknya, defendan telah merujuk kepada sepucuk surat di mana plaintif telah bersetuju untuk menerima 3% daripada 15% terdahulu dan menunjukkan bahawa ini adalah suatu perbezaan. Satu perbezaan terma tidak sama dengan satu terma yang tidak pasti. Lebih-lebih lagi, perbezaan itu telah diterangkan dengan jelas oleh plaintif. Setelah mempertimbangkan semua fakta-fakta, mahkamah mendapati MOU tersebut mengikat pihak-pihak itu dan bahawa pembelaan ketidakpastian yang dikemukakan oleh defendan harus gagal (lihat ms 51D–E, G–H).

(3) Memandangkan plaintif-plaintif telah melaksanakan sepenuhnya tugas mereka dan memandangkan defendan merupakan pihak yang gagal untuk menghormati janji itu, defendan perlu diestopkan daripada menafikan bahawa memang wujud maksud untuk membentuk hubungan undang-undang antara pihak-pihak melalui MOU tersebut (lihat ms 52F).

(4) Cubaan defendan untuk memasukkan perenggan terakhir berhubung dengan dua syarat itu di mana tanah yang dituntut

balik itu patut diberimilik kepada defendan dan ia hendaklah boleh digadaikan bukanlah pra-syarat untuk memenuhi pembayaran kepada plaintif-plaintif itu. Jika defendan telah bermaksud untuk kedua-dua syarat itu sebagai pra-syarat, sepatutnya kedua-dua syarat itu dengan jelas telah menyatakan maksud tersebut. Setelah membaca keperluan kedua-dua syarat itu sebagaimana yang telah dinyatakan di dalam MOU tersebut, mahkamah mendapati bahawa ia merupakan lebih kepada suatu permintaan oleh defendan daripada satu ketetapan sebagai satu pra-syarat (lihat ms 52H–53A).

(5) Memandangkan terdapat keterangan dokumentar bahawa tanah itu telah diberimilik pada 15 April 1993, plaintif berhak untuk mendapat sejumlah RM100,000 dengan faedah 4% bermula daripada 15 April 1993 hingga tarikh penghakiman (lihat ms 54B–C).

(6) Berhubung dengan tuntutan plaintif untuk pelaksanaan spesifik bagi membayar baki yuran perkhidmatan secara berperingkat-peringkat dengan berlakunya peristiwa-peristiwa yang dinyatakan di dalam MOU kedua tersebut, pelaksanaan spesifik itu tidak patut diperintahkan berhubung dengan tuntutan untuk wang. Walau bagaimanapun, plaintif berhak untuk mendapat baki yuran perkhidmatan secara berperingkat-peringkat semasa pembangunan projek itu menurut s 18(2) Akta Relif Spesifik 1950 (lihat ms 54C, G).

(7) Tuntutan terhadap pelaksanaan spesifik untuk memindahkan kepada plaintif masing-masing sebidang tanah kawasan dermaga projek itu atau sebagai ganti, suatu ganti rugi sebanyak RM450,000 kepada tiap-tiap seorang daripada kedua-dua plaintif itu, tidak boleh diterima. Malah tanah itu belum lagi dituntut balik. Walaupun ia dituntut balik kemudiannya, pihak-pihak masih belum mengenalpasti dengan tepat dua bidang tanah di kawasan dermaga itu. Tuntutan terhadap pelaksanaan spesifik harus gagal. Plaintif-plaintif tidak menunjukkan sebarang keterangan bagaimana mereka boleh sampai kepada jumlah RM450,000. Memandangkan defendan tidak bersetuju kepada apa-apa jumlah, adalah jelas menjadi kewajipan plaintif-plaintif untuk membuktikan tuntutan ini. Dengan hanya mencadangkan suatu jumlah atau menyerahkan kepada mahkamah untuk membuat satu award adalah sia-sia. Mahkamah mestilah diberi panduan. Dengan ketiadaan apa-apa panduan, tuntutan ini telah ditolak (lihat ms 55B–D).]

Notes

For cases on specific performance generally, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2943–2983.

For cases on uncertainty, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3121–3128.

Cases referred to

Addiscombe Garden Estates Ltd v Crabbe [1958] 1 QB 513 (refd)
Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd [1998] 6 MLJ 136 (refd)
Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
James Douglas v Joseph Baynes [1908] AC 477 (refd)
Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141 (refd)
Amalgamated Investment and Property Co Ltd (In Liquldation) v Texas Commerce International Bank Ltd [1982] 1 QB 84 (refd)

Legislation referred to

Specific Relief Act 1950 ss 18(2), 20(1)(c)

Lee Chuen Tiat (*TK Woon Lee & Chan*) for the plaintiffs.
S Ashok Kandiah (*A Zahari Kanapathy Thulasi*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam J:

Facts

On or about the end of 1991, the defendant who claimed to be financially sound and technically capable, requested the plaintiffs to secure on its behalf a joint venture arrangement with the Selangor State Government ('the State') to set up a joint venture company ('the proposed joint venture company') to jointly develop a mixed development project known as the Sungai Sembilang Project ('the project') situated at Pantai Remis Sungai Sembilang, Mukim Jeram, Daerah Kuala Selangor.

In consideration thereof, the defendant agreed and undertook to pay to the plaintiffs respectively the following benefits, all contained in several written memoranda of understanding and letters:

(i) To the first plaintiff the defendant agreed to give:
   (a) 15% shares in the proposed joint venture company as contained in a memorandum of understanding (MOU) dated 10 December 1991;
   (b) a piece of water front land of the project as contained in the defendant's letter dated 18 December 1991; and
   (c) a service fee of RM4,200,000 payable progressively during the said development of the project as contained in the memorandum of understanding dated 27 January 1992.

(ii) To the second plaintiff the defendant agreed to give a piece of water front land of the project as contained in the defendant's letter dated 18 December 1991.

The defendant also orally agreed to appoint the first plaintiff to be a director in the proposed joint venture company upon its incorporation.

In reliance upon the defendant's such agreements and undertakings, the plaintiffs secured the said joint venture arrangement as requested by the defendant. Shortly before the incorporation of the proposed joint venture company and after a discussion between the defendant and the plaintiffs, the first plaintiff agreed to reduce his entitlement of the 15% shares in the proposed joint venture company to 5% to be split between the first and second plaintiffs in the ratio of 3:2. By a letter dated 25 February 1992 the defendant again confirmed to both the plaintiffs their respective benefits payable to them and also forwarded to them two separate directors' resolutions of the defendant all dated 25 February 1992. A joint venture company known as Sungai Sembilang Island (Resort) Sdn Bhd ('JV Company') was set up on 17 March 1992 to undertake the project. A joint venture agreement was also executed on 12 June 1992 between the defendant and the State's nominated investment arm, that is, Permodalan Negeri Selangor Berhad ('PNSB'), and a power of attorney was also executed on the same day by PNSB in favour of the JV Company to clothe the JV Company with full authority in respect of all matters pertaining to the development of the project. The State had, by its letter dated 15 April 1993 consented to alienate a piece of land measuring approximately 100 acres to PNSB for the purpose of development of the project. It is to be noted that although the State's letter was dated 15 April 1993, the alienation had already been approved by the State on 4 March 1992. Disputes later arose between the plaintiffs and the defendant as the defendant refused to honour its agreement, in particular the payment of the first progress payment of RM100,000 in accordance with the MOU dated 27 January 1992, the transfer of 5% shares in the JV Company to the plaintiffs and the appointment of the first plaintiff as a director in the JV Company. As a result of the said dispute, both the plaintiffs commenced the present action on 24 March 1994. By a sale and purchase agreement dated 28 July 1995, one Ilham Timuran Sdn Bhd has for valuable consideration bought over the defendant company from its then shareholders. Due to reasons best known to the defendant, the progress of the project was extremely slow and as at the date of hearing, it was only at the stage of submission of building plans.

The plaintiffs' case

The first plaintiff therefore claimed:

(1) the sum of RM100,000 being the first progress payment already due to him as of 15 April 1993;

(2) interest at 8% pa on the said sum calculated from date of filing of action to date of payment;

(3) specific performance as against the defendant to pay to him the balance of the service fee progressively over the development of the project;

(4) specific performance to transfer to the first and second plaintiffs each a piece of water front land of the project measuring 15,000 sq ft or in lieu thereof damages of RM450,000 each to both the plaintiffs; A

(5) specific performance to appoint the first plaintiff as director of the JV Company;

(6) costs; and B

(7) such other relief which this court deems fit and proper.

The defendant's case

The defendant admits to the MOUs but challenges their enforceability on grounds of uncertainty. The defendant also contended that the MOU dated C 27 January 1992 which dealt with the progress payments in respect of the project upon its completion at various stages, is one not capable of being specifically performed under the Specific Relief Act 1950 ('the Act'). Alternatively the defendant averred that the first plaintiff's right to the service fee of RM4.2m under the MOU dated 27 January 1991 has not as D yet accrued as the development of the project had not reached the various stages upon which payment becomes due to the first plaintiff. Further, it was the contention of the defendant that the plaintiffs were not entitled to specific performance under the Act in respect of the transfer of the water front land because the same could only be effected upon reclamation of the land from the sea and this has yet to happen. The defendant also contends E that it did not appoint the first plaintiff as a director of the JV Company as the first plaintiff only held small amount of shares and that he also did not possess the required skill. Alternatively, the defendant argued that the first plaintiff had relinquished his right to directorship at a meeting held on 30 March 1994. The defendant also argued that all benefits payable to the plaintiffs are subject to two conditions, namely that the land to be reclaimed F on which the project is to be built, must be alienated to the defendant and secondly that the defendant should be able to charge the said reclaimed land to finance the project. Finally, it is the defendant's case that 5% shares in the JV Company already transferred to the plaintiffs is sufficient consideration of the services already rendered by the plaintiffs. G

Findings of the court

The plaintiff raised various issues for the court to decide.

(1) *Whether the two MOUs dated 10 December 1991 and 27 January 1992 are void for uncertainty* H

The term 'memorandum of understanding' by itself connotes that it is only a memorandum witnessing the mutual understanding or intention of the parties to do a certain act or to enter into a certain arrangement, usually upon the occurrence of certain other events. It is usually a preparatory agreement for preliminary arrangement and therefore it is generally way too I far from being treated as a valid and enforceable contract which enjoys the binding effect under the law. However it does not mean that all memoranda

A of understanding is per se not binding on the parties as each case must be decided on its own facts.

One of the set rules of construction of a contract is that the court is not bound by the labels that parties choose to affix onto a particular document. The court's duty is to construe the document as a whole to determine from
B its language and other admissible evidence its true nature and purport.

In *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141 Gopal Sri Ram JCA in holding that the court is not bound by the label of a document but has to construe the nature and purport of a document from its language and other admissible evidence went on to quote with approval the judgment of Jenkins LJ in *Addiscombe Garden Estates Ltd v Crabbe* [1958]
C 1 QB 513 wherein Jenkins LJ observed that 'the relationship is determined by the law, and not by the label which the parties choose to put on it ...'.

To my mind, the court has to look at the intention of the parties. Did the parties intend to create a legal relationship? In order to ascertain if such an intention exists the court has to look into the words and expressions the
D parties have used in the document concerned, to communicate with each other considering also the accepted factual matrix upon which the said document was drawn up. The court has to consider if the parties intended to be bound to each other or whether irrespective of whatever might have been said or agreed upon nothing would materialise until the happening of
E some other event such as the signing of a further document. I shall now consider the two MOUs respectively. The first dated 10 December 1991 starts off with the words 'An agreement is hereby made ...'. However what I find most significant are the last three clauses which read as follows:

> 5 In the event the said Joint Venture project does not materialise, this Memorandum of Understanding shall be null and void and have no force
F in law.
>
> 6 Time wherever mentioned herein shall deem to be of the essence of this agreement.
>
> 7 This agreement shall be binding upon the heirs, lawful representatives, successors-in-title and permitted as signee the parties herein.

G And then the parties have affixed their signatures before witnesses. The fact that the parties intended this MOU to have the 'force of law' if the JV project materialised, is clearly and unambiguously expressed by their joint intention. The parties have also expressed their clear intention to bind their heirs and successors-in-title. This first MOU was followed by the
H defendant's letter dated 18 December 1991 and addressed to the plaintiffs. They relate the said letter to the first MOU and confirm their intention to give to both the plaintiffs a block of land each on the water front, free of charge and as a gesture of goodwill for services rendered. To my mind there can be no clearer intention to give than as expressed in the said letter. This letter was followed by the second MOU dated 27 January 1992. This MOU
I also refers to the earlier MOU and confirms that the defendant would make the payments totalling RM4.2m as service fees 'on the following events happening':

(1) A payment of $100,000 ringgit upon issuing of the alienation letters.

(2) A payment of $100,000 on conversion of land and approval of development authority.

(3) A payment of $1,000,000 ringgit on the sale of Condominium.

(4) A payment of $1,000,000 on reclamation of 100 acres.

(5) A payment of S1,000,000 on commencement of construction of Yacht Club.

(6) A payment of $1,000,000 on sale of 1/3 of the 3,000 memberships in Yacht Club.

(7) The joint venture equity will be 35:65 in favour of the investor.

Bearing in mind that the first MOU contained the claim relating to time being of the essence of the contract the defendant in the second MOU confirmed that they would take approximately 18 months to complete the project. The defendant then added a final paragraph which reads as follows:

> We will also require that the land be alienated to our company and that the land to be reclaimed will be able to be charged by our company at any time for the purpose of this development.

By their letter dated 25 February 1992, the defendant stated as follows:

> In consideration of you having at our request successfully concluded the agreement between our company First Revenue Sdn Bhd and Permodalan Negeri Selangor to develop the above project on a joint venture basis, we the undersigned hereby confirm what we will give Encik Ismail bin Mohd Yunus 3% share equity and Encik Tong Teck Chiang 2% share equity in the newly incorporated local company for the above joint venture (hereinafter called the said promoter's fee).

This was accompanied by two directors' resolutions of the defendant confirming the contents of the said letter.

Having considered the full import of the first MOU, I do not find any uncertainty therein. The first plaintiff was required to secure a joint venture arrangement on behalf of the defendant with the state to develop a piece of land in the Mukim of Jeram into a residential and recreational project and in consideration for which the first plaintiff was to receive 15% shares in the proposed JV Company as stated in the first MOU dated 10 December 1991. I had stated earlier that in order to consider the intention of the parties the court has to look into the background factual matrix. The first plaintiff testified that he had met with the state assemblyman for the area, Dato' Miskon, who then met the assistant state secretary, Dato' Karim, who confirmed that the State had decided to go along with the project. When the defendant was informed of this, the defendant instructed its architect from Australia, one John Bruce, to visit the site to prepare a conceptual development drawing for the project. This evidence went unchallenged. It is clear therefore that the first MOU was indeed prepared after the defendant had identified and studied the project site. It is also in evidence that the conceptual development drawing was presented to Dato' Miskon and to Dato' Karim. They were both satisfied with the drawing. Dato'

Karim suggested that the defendant use the Selangor State's investment arm, that is, Permodalan Negeri Selangor Berhad (PNSB) to be the party to the JV arrangement. Dato' Karim was himself the CEO of PNSB. The first plaintiff testified that he had informed the defendant that he incurred expenses during the process of securing the joint venture on their behalf and requested reimbursement of the money he had spent. However, the defendant requested that he view their relationship as a long term commitment. They promised him an attractive service fee in addition to the other benefits already agreed upon and it was not long after this that the second MOU promising the RM4.2m service fee was signed. I note that there has been no challenge to this evidence.

The defendant contends that the MOUs contain terms that are incomplete and uncertain and therefore unenforceable under s 20(1)(c) of the Specific Relief Act 1950 which reads as follows:

> Contracts not specifically enforceable
>
> (1) The following contracts cannot be specifically enforced:
>
> ...
>
> (c) a contract the terms of which the court cannot find with reasonable certainty;

Having relied on s 20(1)(c) which deals with terms which are uncertain the defendant has not pointed out any material uncertain terms in the first MOU dated 10 December 1991. Instead, the defendant refers to the letter dated 25 February 1992 wherein the first plaintiff agreed to accept 3% from the earlier 15% and points out that this is a variation. A variation of a term is not the same as an uncertain term. But that variation was clearly explained by the first plaintiff. He said in evidence that the defendant approached him and sought his consent to reduce the agreed shareholding from 15% to 5% because the defendant was of the view that since the project was quasi-governmental in nature and the joint venture would be primarily between the defendant and PNSB it might attract adverse speculation from the public if the first plaintiff was to hold 15%. It was also urged upon him that since he was to be paid the RM4.2m, though progressively, it would be fair for him to take the 5%. The first plaintiff then discussed with the second plaintiff and with the latter's approval accepted the 5% in the ratio of 3% to him and 2% to the second plaintiff. This evidence was never challenged in cross-examination.

Therefore, having considered all facts it is my judgment that both the MOUs are binding on the parties and that the defence of uncertainty raised by the defendant must fail.

However, as to whether specific performance is available in respect of the various claims made by the plaintiffs is a separate issue.

(2) *Estoppel*

The plaintiffs argue that the defendant is estopped from denying its intention to create legal relationship through the MOUs, the letters, and the

directors' resolutions. It is clear that the defendant never denied that the plaintiffs had successfully secured the joint venture as requested by the defendant, but that the defendant only challenged the plaintiffs' entitlement to the benefits. It is a fact that as a result of the efforts of the plaintiffs (as admitted by the defendant in its letter dated 25 February 1992) the JV Company was set up on 17 March 1992, and that the JV Agreement and a power of attorney giving the said JV Company the right to manage the affairs were executed on 12 June 1992. It is not in dispute from the beginning that the parties had never intended that the plaintiffs were to be responsible for the progress of the project. The progress of the project and all matters pertaining to it were at all material times under the conduct of the defendant. In *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331, the Federal Court said at p 344:

> The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

The Federal Court accepted with approval the judgment of Lord Denning in the *Amalgamated Investment & Property Co Ltd (In Liquldation) v Texas Commerce International Bank Ltd* [1982] 1 QB 84 at p 122 as follows:

> ... When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

It is my judgment therefore that as the plaintiffs had fully performed their task and as it was the defendant who had failed to honour the promise, the defendant must be estopped from denying that there was indeed an intention to create legal relations between the parties, through the MOUs, the letters and the directors' resolutions.

The plaintiffs' entitlement

In the second MOU dated 27 January 1992, the defendant agrees to pay the plaintiffs the sum of RM4.2m as service fee 'on the following events happening' and the defendant lists seven events.

The defendant's attempt to have the final paragraph relating to the two conditions, namely, that reclaimed land be alienated to the defendant and that it should be liable to be charged are not in my view, pre-conditions, for the fulfilment of the seven events. To my mind, if the defendant had intended the two conditions to be pre-conditions they would have clearly expressed such an intention. The defendant would have said that it agrees to pay the sum of RM4.2m provided the said two conditions are fulfilled. Reading the requirement of the two conditions as stated in the MOU I find

that it was more of a request by the defendant than a stipulation as a pre-condition. This view of mine is arrived at after also considering the unchallenged evidence of the first plaintiff who testified that when he asked the defendant why it needed the land to be alienated in its favour the defendant replied that it was because it had come across a few instances where the progress of work was hindered due to ownership problem. As the defendant considered this particular development as its major project in Malaysia and as it might need to inject a substantial amount of money and efforts into the said development, the defendant did not want any unforeseen factors to hinder the progress of the works and that was why it had wanted the land to be alienated in its favour. As for the second condition, he had pointed out to the defendant that since in the first MOU it had stated clearly that it was financially sound and capable of developing the project, why was the need therefore to charge the land, the first plaintiff informed the court that he was assured by the defendant that it had more than enough funds to finance this project. However, as most of its funds were outside Malaysia, and in order to ensure that the project would take off as early as possible, the defendant might need immediate financing from a local bank to finance the project and that that was the reason the defendant had wanted the land to be charged. When he conveyed these two requests to the State, the State responded negatively. He then conveyed this message to the defendant which at its directors' meeting on 25 February 1992 agreed to pay the defendant the sum of RM4m (ought to have been RM4.2m) progressively and there was no mention of the so-called pre-conditions before the money was to be paid.

The defendant attempted to attack the first plaintiff's evidence by contending that the plaintiffs were trying to sneak in parole evidence to vary or add to the terms of a written agreement. The defendant argued that the first plaintiff's explanation is inadmissible pursuant to s 92 of the Evidence Act 1950 which excludes any parole evidence to vary or add to the terms of a written agreement.

It is necessary to reproduce s 92 of the Evidence Act 1950 which reads:

> Exclusion of evidence of oral agreement
>
> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to s 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

However to my mind the proviso (d) to the said s 92 is aptly applicable. The said proviso reads as follows:

> the existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

I had already held that the two conditions are not pre-conditions to the happening of the seven events as stated in the second MOU dated 27 January 1992. However, to consider the defendant's argument on s 92, it is my judgment that proviso (d) allows the first plaintiff to explain the position, even if the two conditions were pre-conditions, which I have already said, I have not so found. The question of parole evidence is not in issue at all.

It is my judgment, therefore that since there is documentary evidence that the Pejabat Daerah Tanah Kuala Selangor had issued out in favour of PNSB the letter of alienation dated 15 April 1993, the first plaintiff is entitled to this sum with interest at 4% from 15 April 1993 to date of judgment. In respect of the third prayer of the first plaintiff seeking specific performance as against the defendant to pay to him the balance of the service fee progressively upon the happening of the events stated in the second MOU, it is my judgment that specific performance ought not to be ordered in respect of a claim for money. In *Arab Malaysian Corp Builders Sdn Bhd & Anor v ASM Development Sdn Bhd* [1998] 6 MLJ 136 this is what I said at p 145:

> It is my judgment that the payment of money is not to be regarded as specific relief under the SRA. In other words, the relief provided under this Act is a relief in specie, that is, the performance of a specific act or the delivery of particular articles and not relating to the payment of money, unless of course the contract is for the delivery up of particular or specific coins. In this context, s 20(1) of the SRA which states:
>
> (a) a contract for the non-performance of which compensation in money is an adequate relief;
>
> is very pertinent. A claim for money is not specifically enforceable. Where an injunction is sought in respect of an obligation that 'arises from contract', the court must be guided by Ch II of the SRA and it is noteworthy that s 20(1) is found in Ch II of the SRA. And s 54(f) of the SRA disallows the grant of an injunction to prevent a breach of a contract that is not specifically enforceable.

The plaintiffs ought to have asked for compensation in lieu of specific performance, such compensation as has been mutually agreed to by the parties upon the occurrence of the specific events. It is my judgment therefore that the plaintiff is entitled to the balance of the service fee progressively over the development of the project pursuant to s 18(2) of the Specific Relief Act 1950 which reads as follows:

> If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

As for the demand for specific performance to transfer to the first and second plaintiffs each a piece of water front land of the project measuring 15,000 sq ft or in lieu thereof damages of RM450,000 each to both the plaintiffs, the defendant is on terra firma. In *James Douglas v Joseph Baynes* [1908] AC 477, the Privy Council held that specific performance could not be decreed of a contract between the plaintiff and defendant by which the latter agreed to transfer to the former a farm in the Transvaal on which

deposits of tin ore had been found in consideration of 3700 shares of 51 each in a syndicate to be formed for the 'purpose of developing' the same as a mining property, the 3700 shares to represent the appellant's holding in a syndicate of 12,000 shares. The price to be paid by the plaintiff was wholly uncertain. It was to consist of shares in a syndicate whose purpose of development there was no evidence to define, either as to the nature and extent of the operations contemplated or as to what the parties meant by it, the value of the shares depending upon the adequacy of working capital which was neither ascertained nor ascertainable.

Referring to the case before me, it is my judgment that this claim is unsustainable. Firstly the land has not even been reclaimed. Even if it is reclaimed subsequently, the parties have not identified precisely 'the two blocks of land on the water front' referred to in the letter dated 18 December 1991 from the defendant to the plaintiff, before an order for specific performance could be made. On this ground, that the parties have not identified the blocks of land given to the plaintiffs, the claim for specific performance must fail. The plaintiffs however claim a sum of RM450,000 each in lieu of specific performance. However the plaintiffs led no evidence as to how they were able to pick this figure. Since the defendant has not agreed to any figure it is clearly incumbent upon the plaintiff to prove this claim. Merely suggesting a figure or leaving it to the court to make an award, is fruitless. The court must be guided. In the absence of any guidance, this claim is rejected. As for the claim to appoint the first plaintiff as a director of the JV Company, since the plaintiffs have not considered this claim in their submission, I take it that it has been abandoned.

There is a minor issue that I have to consider.

Change of ownership of defendant

The defendant raises a half-hearted plea that there has been a change of ownership of the defendant as of 28 July 1995 wherein one Ilham Timuran Sdn Bhd acquired 100% of the shares of the defendant from the previous shareholders. It must be noted that this suit was filed in 1994. The present shareholders have not pleaded nor testified that they were unaware of this suit. I cannot therefore accept that the present shareholders would not know of the full facts of this case before venturing to purchase the 100% equity of the defendant. The defendant is a separate legal entity distinct from its shareholders, and I hold that the corporate veil should not be lifted to the detriment of the plaintiffs. Lifting the corporate veil in a like situation would be setting a dangerous precedent which might give an opportunity to an unscrupulous defendant an avenue to escape his legal liability. In any case the issue of change of ownership has not been pleaded at all in the defence notwithstanding the fact that it was amended on 3 May 1999, that is, about four years after the change of ownership had taken place.

In the circumstances, I give judgment for the plaintiffs as follows:

(1) Judgment for RM100,000.

(2) Interest on the said sum at 4% from 15 April 1993 to date of judgment.

(3) Defendant to pay the balance of the service fee progressively upon the happening of the events stated in the second MOU dated 27 January 1992.

(4) Costs.

Order accordingly.

Reported by Jafisah Jaafar